2006

Salt Lake City v. Frederick Thomas George : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SALT LAKE CITY, Plaintiff/Appellee,	:	
v.	:	Case No. 20060591-CA
FREDERICK THOMAS GEORGE, Defendant/Appellant.	:	Appellant is not incarcerated.

BRIEF OF APPELLANT

Interlocutory appeal from order denying Appellant's motion to exclude evidence where defendant is charged with driving under the influence, a class A misdemeanor, in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Robin W. Reese, judge, presiding.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(d) (2002). Appellant Frederick Thomas George timely petitioned for interlocutory review of a trial court order dated June 7, 2006. See Order being appealed from at R. 84-90 in Addendum A. This Court granted Mr. George's petition for interlocutory review on the issues set forth below. See this Court's order granting interlocutory review in Addendum B.

ISSUES PRESENTED, STANDARDS OF REVIEW, PRESERVATION

This Court granted interlocutory review on the following issue and subissues:

Issue: Whether an officer's affidavit regarding the maintenance and certification of a machine used to test defendant's blood alcohol level is testimonial in nature so that its admission violates the Sixth Amendment right to confrontation where the officer is unavailable for cross-examination?

Subissue I: Whether Utah Code Ann. § 41-6a-515 which allows admission of an officer's affidavit made for the purposes of establishing at trial that the machine which officers used to test defendant's blood alcohol level had been properly maintained and

was operating properly at the time of the incident, violates the Sixth Amendment right to confrontation.

Subissue II. Whether an expert may substitute testimony for another expert when the testifying witness did not perform the test, without violating the Sixth Amendment right to confrontation.

Standard of Review: The question of whether the officer's affidavit is testimonial in nature involves a question of law which is reviewed for correctness. Salt Lake City v. Williams, 2005 UT App 493, ¶10, 128 P.3d 47. A constitutional challenge to a statute also presents a question of law that is reviewed for correctness. State v. Green, 2004 UT 76, ¶42, 99 P.3d 820.

Preservation: These issues were preserved by written motion and argument held at a hearing on February 8, 2006. The trial court entered a Memorandum Decision denying Mr. George's motion. See Addendum A.

TEXT OF RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

The texts of Utah Code Ann. §41-6a-515 (2005), former Utah Code Ann. §41-6-44.3, and the Sixth Amendment to the United States Constitution are in Addendum C.

STATEMENT OF THE CASE

The City filed an Information on April 12, 2005, charging Mr. George with driving under the influence (DUI), a class A misdemeanor, open container, a class B misdemeanor and violation of park curfew, an infraction. R. 1-2. Mr. George filed a motion in limine and supporting memorandum, requesting that the trial court exclude the

breath test affidavits prepared by a highway patrol trooper for use at DUI trials. R. 41-60; a copy of the affidavits is in Addendum D. The City filed a motion in limine in response, asking the court to admit the intoxilyzer affidavits. R. 63-76. Following a hearing, the trial court denied Mr. George's motion to exclude the affidavits and issued a memorandum decision. See Addendum A.

Mr.George filed a timely petition for interlocutory review, which this Court granted. See Addendum B.

STATEMENT OF THE FACTS

This case has not gone to trial and the City has not submitted any evidence. For purposes of the motion, Mr. George outlined the following facts, but clarified that he did not stipulate to this evidence or its accuracy:

"On March 31, 2005 at 4:50 a.m., officers observed a white Chevy Lumina parked in the parking lot of a neighborhood park. Mr. George was in the driver's seat and officers noticed bottles of alcohol in the car. Two other individuals were in the back seat. The officers had Mr. George do field sobriety tests and took him to the station to submit to a breath test. The results showed that Mr. George's blood alcohol level was .13." R. 41.

The City seeks to admit evidence regarding Mr. George's blood alcohol content by submitting Intoxilyzer breath test results. For those results to be admissible at trial, the City must provide specific foundational evidence in compliance with Utah Code Ann. § 41-6a-515 and Utah Administrative Rule 714-500 and must otherwise establish that the

machine was maintained and operating properly at the time officers used it to test Mr. George's blood alcohol level.

In this case, the City seeks to establish necessary foundational evidence by using an affidavit prepared by a highway patrolman for use in criminal trials. R. 79-81. The officer, Trooper Camacho, is out of the country and unable to testify. R. 42. He has prepared two affidavits before and after March 31, 2005, stating, among other things, that he is competent to testify, has personal knowledge of the information in the affidavits, performed several tests with a sample on Intoxilyzer 5000/8000, serial number 68002336, and that the machine did not need repairs. R. 79-81. The breath test affidavits are in Addendum D. The City also apparently seeks to use Sergeant Steven Winward, Officer Camacho's supervisor, as a substitute expert even though Sergeant Winward did not perform the tests on the intoxilyzer and has no personal knowledge of the testing procedure Officer Camacho actually performed. R. 79.

SUMMARY OF THE ARGUMENT

The trial court erred in concluding that the breath test affidavits prepared by a highway patrol trooper for use at DUI trials were not testimonial and therefore could be admitted at trial without violating the Sixth Amendment right to confrontation. The Sixth Amendment requires that a criminal defendant be afforded the right to confrontation when the state seeks to introduce testimonial evidence. Although the United States Supreme Court has not given a comprehensive definition of testimonial hearsay, it has indicated that evidence is testimonial if the declarant could have reasonably believed the evidence would be used in a later trial. Also, hearsay evidence is testimonial when

evidence is intended as a substitute for live testimony, the witness bears testimony by making an affirmative statement for the purpose of proving a fact, or the evidence bears a "striking resemblance" to the *ex parte* examinations used without confrontation at common law. In addition, when the primary purpose of the hearsay statement was to establish a fact necessary to convict a criminal defendant, evidence is testimonial and subject to Confrontation Clause protection.

The affidavits in this case are testimonial since the trooper prepared them for use in DUI trials in order to prove facts necessary for conviction. The officer knew the affidavits would be used in trials when he prepared them, they were intended as a substitute for his live testimony, the trooper bore his testimony through the affidavits, and the affidavits bear a "striking resemblance" to *ex parte* examinations the Framers intended to do away with in adopting the Sixth Amendment Confrontation Clause.

Utah case law further demonstrates that affidavits such as these must be subjected to cross-examination in order to ensure their reliability. The trooper makes subjective assessments in conducting the tests and is a law enforcement officer conducting the testing in order to prosecute individuals. According to Utah case law, under these circumstances a defendant's right to confrontation would be violated if the affidavits were admitted without allowing cross-examination.

Because Utah's statute allows the use of affidavits such as these, the statute offends the Sixth Amendment. In addition, the trooper who conducted the test, not a substitute, must be available to meet confrontation concerns. Allowing the use of breath

test affidavits or a substitute expert without giving a defendant the opportunity to cross-examine violates the Sixth Amendment.

ARGUMENT

POINT. ADMISSION OF THE INTOXILYZER AFFIDAVITS OR SUBSTITUTE TESTIMONY VIOLATES MR. GEORGE'S SIXTH AMENDMENT RIGHT TO CONFRONTATION SINCE THE EVIDENCE IS TESTIMONIAL, THE WITNESS WHO CONDUCTED THE TESTS IS UNAVAILABLE AND MR. GEORGE HAS NOT HAD A PRIOR OPPORTUNITY TO CROSS-EXAMINE THE WITNESS

The trial court erred in concluding that the affidavits prepared by Trooper Camacho for use at trial could be admitted without violating the Sixth Amendment. Admission of testimonial evidence at trial when the witness is not available and the defendant has not had a prior opportunity to cross-examine violates the Sixth Amendment right to confrontation. See Crawford v. Washington, 541 U.S. 36 (2004). Since the intoxilyzer affidavits the City seeks to admit in this case are testimonial in nature, and the officer is unavailable to testify and Mr. George has not had a prior opportunity to cross-examine him, the admission of the affidavits violates Mr. George's constitutional right to confrontation. Id. In addition, Utah Code Ann. §41-6a-515, which allows the admission of such affidavits in lieu of testimony, violates the Sixth Amendment since it allows testimonial hearsay evidence when a witness is unavailable and has not been cross-examined by the defendant. Moreover, any attempt by the City to admit this evidence through a substitute expert or under a hearsay exception fails because the evidence is not admissible under a hearsay exception and even if it were, it would nevertheless violate

the Sixth Amendment since the witness who performed the tests is not available and Mr. George has not had a prior opportunity to confront him.

In order to introduce intoxilyzer results at trial, the state must lay the proper foundation to establish the reliability of the results. See State v. Vialpando, 2004 UT App 95, ¶14, 89 P.3d 209 (citing State v. Baker, 355 P.2d 806, 809-10 (Wash. 1960)). Utah has adopted the Baker test for establishing the reliability of breath test results which requires that the state establish, among other things, that "the intoxilyzer machine had been properly checked by a trained technician, and that the machine was in proper working condition at the time of the test." Vialpando, 2004 UT App 95, ¶14. Historically, the state has established that the intoxilyzer machine was "properly checked by a trained technician" and in proper working order by submitting affidavits from the technician indicating that the machine was tested and working properly both before and after the date of the charged crime. See Murray City v. Hall, 663 P.2d 1314, 1319-21 (Utah 1983); Utah Code Ann. § 41-6a-515 (2005); former Utah Code Ann. § 41-6a-44.3.

Utah Code Ann. 41-6a-515 (and its predecessor, Utah Code Ann. § 41-6-44.3) explicitly allows the use of affidavits to establish foundation for admission of the intoxilyzer test results. Utah Code Ann. § 41-6a-515 states in part:

> (1) The commissioner of the department shall establish standards for the administration and interpretation of chemical analysis of a person's breath or oral fluids, including standards of training.
> (2) In any action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or any drug or operating with a blood or breath alcohol content statutorily prohibited, documents offered as memoranda or records of acts, conditions or events to prove that the analysis was made and the instrument used was accurate, according to standards established in Subsection (1), are admissible if:

(a) the judge finds that they were made in the regular course of the investigation at or about the time of the act, condition or event; and
(b) the source of the information from which made and the method and circumstances of their preparation indicate their trustworthiness.

(3) If the judge finds that the standards established under subsection (1) and the conditions of Subsection (2) have been met, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

Utah Code Ann. § 41-6a-515.

In Murray City v. Hall, decided prior to Crawford, the Utah Supreme Court considered whether Utah Code Ann. § 41-6-44.33, the predecessor to section 41-6a-515[1], violated the right to confrontation by allowing an officer's affidavit to be used in lieu of testimony. The Court concluded that the statute did not violate the right to confrontation because the findings necessary under the statute ensured the reliability of the hearsay evidence. Hall, 663 P.2d at 1319. In addition, our supreme court reasoned that the right to confrontation is not absolute and must give way to legitimate governmental interests. Id. at 1322. Moreover, the Court pointed out that because the defendant has the ability to subpoena the officer who tested the machine, use of the officer's affidavits did not violate the right to confrontation. Id.

The trial court noted that while Hall might appear to resolve the issue, two problems preclude that decision from controlling the outcome in this case. R. 85. First, the decision in Hall was premised in part on the Court's recognition that in cases where the defendant wanted to question the officer, the accused could subpoena the officer to testify at trial. R. 85; see Hall, 663 P.2d at 1322. Because Trooper Camacho is not

[1] Utah Code Ann. § 41-6-44.3 contained language substantially similar to that of the current Utah Code Ann. § 41-6a-515.

available, Mr. George cannot subpoena him in this case. Second, and more critically, "Hall was decided prior to the seminal case of Crawford v. Washington." R. 85. Since the Utah Supreme Court in Hall focused on the reliability of the evidence in reaching its decision and the United States Supreme Court subsequently rejected such an approach in Crawford, instead mandating that an accused be able to confront when the state seeks to admit testimonial evidence, the trial court correctly recognized that Crawford precludes Hall from controlling the decision in this case. Crawford, 541 U.S. 36; see also Hall, 663 P.2d at 1319-21.

As the trial court also correctly recognized, this case requires a determination of whether an officer's affidavit can be used in lieu of testimony without violating the Sixth Amendment when (1) the officer is not available and therefore cannot be subpoenaed, (2) Crawford has now made it clear that testimonial statements are admissible at trial only when the declarant is unavailable and the defendant has had a prior opportunity to cross-examine, and (3) Mr. George has not had a prior opportunity to cross-examine the officer. R. 86. Although the trial court correctly recognized that Hall did not control the resolution of this case because the officer was not available to be subpoenaed and Crawford fundamentally altered Confrontation Clause analysis, that court incorrectly concluded that the affidavits encapsulating the officer's testimony were not testimonial and therefore did not require Confrontation Clause protection. See R. 85-89.

Although affidavits could be used in the past to establish that an intoxilyzer machine was tested and properly working when the test was administered to a defendant, the United States Supreme Court decision in Crawford now precludes the use of such

affidavits. Indeed, Crawford holds that testimonial hearsay cannot be admitted without violating the Confrontation Clause when the witness is not available and the defendant has not had a prior opportunity to cross-examine the witness, regardless of whether the evidence is reliable. Crawford, 541 U.S. at 63, 68. Because the affidavits the state seeks to use against Mr. George are testimonial in nature, the trial court erred in concluding that the state could use the affidavits to establish the reliability of the breath test results.

The Confrontation Clause of the Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. In Crawford, the Supreme Court discarded its prior willingness to analyze confrontation claims based on the reliability of the evidence and instead required that the explicit protection set forth in the Confrontation Clause apply when the state seeks to use testimonial evidence against an accused. 541 U.S. 36, 63, 68.

While the Court "[left] for another day any effort to spell out a comprehensive definition of 'testimonial,'" it made clear that the definition of "testimonial" is guided by the historical purposes of the Confrontation Clause and the evils at which it was directed. Id. at 68. At the very least, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [ ] police interrogations" involve "testimonial" hearsay. Id. at 43-50, 68. The historical evil at which the Confrontation Clause was principally directed, "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused" also qualifies as testimonial. Id. at 50.

This means that the state's attempts to use *ex parte* examinations against a defendant in a criminal trial violate the Confrontation Clause. Id. at 51.

While not all hearsay is testimonial so as to require exclusion when a person who has not been cross-examined is not available, the Confrontation Clause does apply to witnesses who bear testimony. Id. at 51. And testimony typically consists of "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact'" Id. (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). Formal statements to government officials qualify as testimonial, and the text and history of the Clause "reflect[ ] an especially acute concern with a specific type of out-of-court statement" which includes, among other things, *ex parte* testimony in the form of affidavits and statements "which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 51-2.

The confrontation protection applies to this "core class of 'testimonial' statements" and requires that such statements be excluded from evidence at trial when the witness is unavailable unless the defendant has had a prior opportunity to cross-examine. Id.

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," [citation omitted] "extra-judicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992)(THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" [citation omitted].

Id. Hence, while Crawford did not provide a comprehensive definition for "testimonial" evidence, it nevertheless provided guidance in assessing whether evidence is testimonial, and directed that certain evidence, including *ex parte* affidavits made in anticipation of litigation, is not admissible when the witness is unavailable.

Following Crawford, the United States Supreme Court revisited the question of what constitutes "testimonial" hearsay so as to mandate the protection of the Confrontation Clause. See Davis v. Washington, 126 S.Ct. 2266 (2006). In Davis, the issue was whether a "recording of a 911 call qualifies" as testimonial hearsay, requiring its exclusion when the witness is unavailable. Id. at 2274. The Court adopted a "primary purpose" test, holding that statements are not testimonial "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis, 126 S.Ct. at 2273. On the other hand, statements "are testimonial when circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id. at 2273-74. Accordingly, a 911 call is not testimonial where the primary purpose of the questioning is to aid an ongoing emergency.

By contrast, when there is no ongoing emergency and the primary purpose of the statement is to establish that a person committed a crime, the hearsay is testimonial and protected by the Sixth Amendment. In Hammon v. Washington, the companion case to Davis, the Court concluded that hearsay statements of the defendant's wife, which were

taken to investigate a possible crime after it had occurred, were testimonial hearsay. Davis, 126 S.Ct. at 2278. The Court determined that the statements bore a "striking resemblance" to *ex parte* examinations since the defendant was not able to participate in the examination of the witness and "[s]uch statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." Id. at 2278 (emphasis in original).

In addition to utilizing the primary purpose test for assessing whether statements are testimonial, the Court in Davis also clarified that any statement, not just those resulting from interrogation, might qualify as testimonial. Davis, 126 S.Ct. at 2274 n. 1. As the Court explained, the Framers included voluntary testimony as well as testimony brought about by questioning, within the Sixth Amendment confrontation protection. Id.

This Court addressed the definition of "testimonial" for Sixth Amendment purposes in Salt Lake City v. Williams, 2005 UT App 493, 128 P.3d 47. In that case, the prosecution presented a victim's hearsay statements that were made during an ongoing crime. Id. at ¶8. This Court held the statements were not testimonial, reasoning that when the victim made the statements she was not responding to a police inquiry and "was not providing the information for use in a prosecution or investigation," and instead, her statement was "simply a factual statement made in surprise when she first noticed [the defendant]." Id. at ¶19. Because the statement "'[bore] little resemblance to the civil-law abuses the Confrontation Clause targeted,'" this Court held that its admission did not violate the right to confrontation. Id. (quoting Crawford, 541 U.S. at 51).

Moreover, some of the victim's statements in Williams could be heard on the 911 call made as part of the incident. Id. at ¶¶20, 21. This Court reasoned that the victim could reasonably have expected that her statement would be heard by the 911 operator and employed analysis similar to that subsequently used by the Supreme Court in Davis to conclude that the 911 statement in that case was part of an ongoing event and a "cry for help" rather than "an attempt to investigate or prosecute a crime against a defendant." Id. at ¶22. Because the statements overheard on the 911 call were a "cry for help" rather than aimed at prosecuting a crime, the hearsay was not testimonial in Williams. Id. at 24.

Courts have held that breath test affidavits similar to those in this case are "testimonial" and therefore inadmissible if the affiant is unavailable and the defendant has not had a prior opportunity to cross-examine. See e.g. Martin v. State, 936 So.2d 1190, 1192 (Fla. Dist. Ct. App. 2006); Shiver v. State, 900 So.2d 615 (Fla. Dist. Ct. App.App. 2005). While some courts have held that breath test affidavits are not testimonial, in circumstances similar to the current case where the affidavit was prepared by law enforcement to be used for prosecution, the better reasoned decisions have concluded that breath test affidavits prepared for prosecution are testimonial and subject to Sixth Amendment protection. See State v. Campbell, 719 N.W.2d 374, 377 n.1 (N.D. 2006) (recognizing the split in authority and citing cases that have been decided both ways). In fact, these better reasoned decisions are consistent with Crawford and Davis which require that affidavits such as those in the present case which are prepared to be used against accused persons in criminal prosecutions are testimonial in nature and subject to confrontation. See Crawford, 541 U.S. at 50-2 (*ex parte* affidavits against an

accused are testimonial when "an objective witness [would] reasonably [ ] believe that the statement would be available for use at a later trial"); Davis, 126 S. Ct. at 2273-74 (statements that did not have a primary purpose of obtaining emergency aid and which are intended as a substitute for live testimony, to be used in lieu of a witness, are testimonial in nature); see also Williams, 2005 UT App 493, ¶¶20-22 (statements made for the purposes of prosecuting a crime are testimonial).

Shiver is consistent with Crawford and Davis in reasoning that when a declarant is reasonably certain that a statement will be used to prosecute, that statement is testimonial and requires Confrontation Clause protection. Crawford, 541 U.S. at 51-2; Shiver, 900 So.2d at 618. The court held in Shiver that a breath test affidavit was testimonial since "[i]t contained statements one would reasonably expect to be used prosecutorially, and was made under circumstances which would lead an objective witness to reasonably believe the statements would be available for trial. In fact, the only reason the affidavit was prepared was for admission at trial." Shiver, 900 So.2d at 618; see also Martin, 936 So.2d at 1192 (breath test affidavit was testimonial since it was prepared by law enforcement for trial and used against defendant in a criminal prosecution); Crawford, 541 U.S. at 51-2 (formal statements by witnesses that "declarants could reasonably expect to be used prosecutorially" are testimonial).

Because the Sixth Amendment provides "'a procedural rather than a substantive guarantee' and 'commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination,'" admission of a breath test affidavit violates the Sixth Amendment. Shiver, 900 So.2d at

618 (quoting Crawford, 124 S. Ct. at 1370). As the Shiver court recognized, a breath test affidavit "contain[s] testimonial evidence regarding when the statutorily required maintenance of the instrument was performed. This information was crucial, because the admissibility of Appellant's breath test results were dependent upon the instrument having met the statutory requirements which, in turn, was dependent upon timely and proper maintenance." Id. at 618. Since the defendant was unable to cross-examine the officer who maintained the machine, his right to confrontation was violated. Id.

Belvin v. State, 922 So.2d 1046, 1050-51 (Fla. Dist. Ct. App. 2006) also followed Crawford in holding that breath test affidavits are testimonial in nature and their admission violates the Sixth Amendment. Although a statute allowed the use of affidavits prepared by officers who maintained the machine, the Court reasoned that the Sixth Amendment right to confrontation trumped the statute since the affidavits were "usually generated by law enforcement for use at a later criminal trial or driver's license revocation proceeding." Id. at 1050. Because the affidavits were therefore "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'" the Belvin court concluded they were testimonial and entitled to Sixth Amendment protection. See id. (citation omitted).

The affidavits in this case are testimonial in nature and subject to Confrontation Clause protection since they were prepared for use in prosecution. The affidavits themselves recognize that they were prepared for use at trial since they indicate that the trooper is competent to testify. In addition, Utah Code Ann. §41-6a-515 plainly

recognizes that the affidavits are prepared for use in prosecution, stating that the affidavits may be used "[i]n any action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence . . . ." Utah Code Ann. §41-6a-515(2). The statute further acknowledges that the affidavits are prepared for use in prosecution rather than for routine record keeping purposes when it uses the word "prove," discusses admissibility, refers to the trustworthiness of the affidavits, and relies on the judge's findings in two different places. Id. Because an "objective witness [would] reasonably believe that the statement would be available for use at a later trial," (Crawford, 541 U.S. at 50-2), the affidavits are testimonial. See Shiver, 900 So.2d at 618.

In addition, the trooper's affidavits were intended as a substitute for live testimony, thereby demonstrating that the affidavits are testimonial. See Davis, 126 S.Ct. at 2273-74. The trooper intended to bear his testimony through affidavits, and the affidavits were prepared for the purpose of proving the necessary and important foundational fact of whether the intoxilyzer was working properly. See Crawford, 541 U.S. at 51. The affidavits were prepared by law enforcement personnel for use in prosecution, further undermining their reliability and further demonstrating that they are testimonial. See State v. Bertul, 664 P.2d 1181, 1184-87 (Utah 1983) (affidavits prepared by police for prosecution are generally not considered reliable when offered by the state). And, the affidavits bear a "striking resemblance" to *ex parte* examinations, whose use at trial the Confrontation Clause seeks to eradicate. See Davis, 126 S.Ct, at 2278; Crawford, 541 U.S. at 52. Pursuant to Crawford and Davis, the affidavits are testimonial

because they were prepared by law enforcement personnel for use in prosecution, and the primary purpose for the affidavits was not to obtain emergency aid, or even routine bookkeeping, but instead to prosecute individuals for DUI crimes. See Crawford, 541 U.S. 36; Davis, 126 S.Ct. 2266.

Concluding that breath test affidavits prepared for the purposes of prosecution are testimonial follows the mandates of Crawford and Davis while also ensuring that criminal defendants have an opportunity to cross-examine to test the trustworthiness of the information contained in the affidavits. This is not merely a mechanical protection; instead, requiring cross-examination encourages officers to thoroughly and accurately conduct the testing and protects the integrity of the criminal justice system by testing the reliability and accuracy of the testing procedures through cross-examination.

Cross-examination of Trooper Camacho in this case would not be merely mechanical or theoretical and instead would further the truth-seeking process and protect the integrity of Utah courts. Subjecting officers who maintain the intoxilyzer machines and who attest that machines were working properly so as to prosecute an individual to cross-examination will aid the truth-seeking function of criminal trials by encouraging officers to carefully conduct the testing procedures while also avoiding false convictions based on incorrect breath test results. In addition, without discussing at length the numerous questions defense counsel might have for Trooper Camacho regarding the maintenance and testing of the intoxilyzer, the affidavits themselves give rise to a multitude of questions as to how the maintenance and testing were conducted. For example, as the affidavits demonstrate, the trooper checks the machine by running three

tests with a "known" sample. Where did the sample come from? Did the trooper mix it? How does he know the sample was accurate? Did he use the intoxilyzer to test the sample's accuracy? Cross-examination of the trooper would necessarily include questions as to what kind of sample was used, how it was mixed, and whether it was properly compounded.

Other aspects of the trooper's testing which require cross-examination are also evident in the affidavit. In conducting the test, the trooper must make sure that the air pump works and also run the air pump for twelve to fifteen seconds. How long the trooper waited, whether other people were present or he was distracted by other things, whether an invalid test was run, what temperature the trooper read and a variety of other details that require questioning are evident from the affidavit. In the end, the trooper's statement that the tests were made, the proper procedure was followed, and the machine was working properly are conclusory statements that should be subjected to cross-examination to ensure their reliability.

In addition, the recognition by Utah appellate courts of the unreliability of documents prepared by law enforcement personnel for use in prosecution further demonstrates the need for cross-examination of the officer who maintains and tests the intoxilyzer machine. See Bertul, 664 P.2d at 1184-85; Layton City v. Peronek, 803 P.2d 1294, 1297 (Utah App. 1990). In Bertul, the Court recognized that documents prepared "with an eye toward litigation" are generally not considered reliable "when offered by the party responsible for making the record." Bertul, 664 P.2d at 1185 (citation omitted). When reports are made in contemplation of litigation, they "are generally made for the

purpose of successfully prosecuting a crime, the reasons which might otherwise provide a basis to assume reliability of such reports as business records do not exist where police reports are offered by the prosecution in a criminal proceeding." Id. at 1184. The Court recognized that while such "reports may not be readily describable as 'dripping with motivation to misrepresent,'" cross-examination is required "when the information in the report calls into question the motivation and the accuracy of the perception, recall, manner of language usage, or the soundness of the conclusions of the author of the report." Id. at 1185. Hence, when the prosecution offers a report prepared by officers in anticipation of litigation, the report is not considered to be sufficiently reliable to be admissible under the business records exception. Id.; see also, Peronek, 803 P.2d at 1297-98 (incident report prepared by officer "with intent to submit it to the court for 'prosecution' of a probation violation" was not sufficiently reliable to be admissible under the business records exception for hearsay evidence). Because these affidavits were prepared by a highway patrolman for use as evidence in DUI prosecutions, their reliability is undermined so as to make them inadmissible.[2]

Our Supreme Court has also emphasized the need for confrontation in circumstances where, as is the case here, a state employee conducts testing that has a

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[2] Regardless of whether the affidavits qualify for admission under a hearsay exception, they are inadmissible because they are testimonial and it would violate Mr. George's right to confrontation to admit them. See State v. Moosman, 794 P.2d 474, 479-80 (Utah 1990) (even if evidence is admissible under a hearsay exception, admission may violate the right to confrontation). Nevertheless, while admission of the affidavits in this case violates the Sixth Amendment, the affidavits are also inadmissible under a hearsay exception pursuant to Bertul and the language of the business records hearsay exception which excludes "in criminal cases, matters observed by police officers and other law enforcement personnel . . . ." Rule 806(8)(B), Utah Rules of Evidence.

subjective component. See State v. Workman, 2005 UT 66, 122 P.3d 639. In Workman, the Court addressed the issue of whether toxicology reports prepared at the state crime lab could be introduced under the residual hearsay exception when the witness who prepared the reports was not available to testify. Id. at ¶¶7-22. In concluding that the reports were not admissible under the residual hearsay exception, the court recognized "'[s]imply because [hearsay] might be admissible under a hearsay exception does not mean that those statements automatically pass constitutional muster. If the evidence violates a defendant's right to confront witnesses, it should not be admitted.'" Id. at ¶17 (quoting Moosman, 794 P.2d at 479-80) (alterations in original). Admission of the toxicology reports in absence of the witness who prepared them deprived Workman of her right to confrontation and precluded admission under the residual hearsay exception because there was "a significant subjective element involved in the testing at issue, including a criminologist determining the results of the color tests and comparing the spectra from the gas chromatograph mass spectrometer test with the spectra from known substances." Id.

As in Workman, there is a subjective aspect to the testing in this case. The trooper must create or obtain a sample solution and run it through the machine after determining that the air pump works and running the pump an appropriate amount of time; the trooper must also conduct a number of other checks or verifications and determine whether the simulator solution was properly compounded. Since these steps require accuracy and subjective assessments, cross-examination is necessary to ensure the reliability of the trooper's testimony and conclusions.

Workman also demonstrates that the state cannot use a substitute witness to testify regarding the details of Trooper Camacho's testing without offending the Sixth Amendment. Workman, 2005 UT 66, ¶¶19-22. Pursuant to Workman, substitute experts cannot be used when the testing at issue contains subjective, non-routine or detailed aspects, i.e. when cross-examination of the witness who conducted the testing is necessary to determine its reliability. Id. (citing Kofford v. Flora, 744 P.2d 1343, 1356 (Utah 1987); Moosman, 794 P.2d at 479-80). This is consistent with Crawford which precludes the use of testimonial evidence unless the declarant can be cross-examined. See Crawford, 541 U.S. 36. Since Trooper Winward was not involved in the testing and is not certified to conduct the testing (R. 44-5), and the conclusion as to whether the machine was working properly involves a subjective determination, the state cannot use a substitute witness to present Trooper Camacho's testimony.

Workman and Bertul demonstrate that an affidavit prepared by a police officer for use in prosecution is not sufficiently reliable to allow its admission under a hearsay exception. These cases are consistent with Crawford and Davis in that they demonstrate the need for cross-examination when the state seeks to use affidavits as testimonial evidence to establish that an intoxilyzer was properly maintained and tested. In addition, Workman clarifies that any testimonial hearsay, whether introduced through an affidavit or substitute witness, violates the Sixth Amendment right to confrontation.[3]

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[3] As Mr. George pointed out below, Utah Admin. Rule 714-500 requires, among other things, that "[o]nly certified breath alcohol testing technicians . . . shall be authorized to provide expert testimony concerning the certification and all other aspects of the breath

Despite the fact that Crawford and Davis require confrontation since the affidavits were prepared for prosecution, the trial court incorrectly concluded that the affidavits were not testimonial. R. 89. While the trial court acknowledged that the affidavits were being used in lieu of testimony (R. 89), it relied primarily on State v. Norman, 125 P.3d 15 (Or. Ct. App. 2005) to reach its incorrect conclusion that the affidavits in this case were not testimonial. R. 86-7. The Oregon court of appeals decided in Norman that the breath test affidavits in that case were not testimonial because (1) they were not prepared for use in a specific case to convict a specific defendant, (2) the technicians were not operating as part of a police investigation, and (3) the affidavits would have been admissible under a hearsay exception at common law and therefore did not implicate confrontation clause concerns. Norman, 125 P.3d at 18-19.

The Norman rationale is not persuasive in Utah, however, because the affidavits the state seeks to use in this case were prepared for use in prosecution and would not have been admissible at common law under a business records hearsay exception. See Bertul, 664 P.2d at 1184-85; Utah Code Ann. §41-6a-515. In fact, while the affidavits were not prepared for a specific case, they were prepared for use at trial, making them testimonial. See Crawford, 541 U.S. at 50-2. In addition, the language of the statute plainly requires that the affidavit be "made in the regular course of the *investigation*" (Utah Code Ann. §41-6a-515(emphasis added)); hence, unlike the affidavits in Norman, the trooper in this case was operating as part of the police investigation. Moreover, as

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testing instrument under his/her supervision.," and Trooper Winward, the state's apparent substitute, does not fit these criteria. R. 44-5.

outlined above, the affidavits in this case would not be admissible in Utah since the tests were performed by law enforcement for use at trial and cross-examination is therefore necessary to ensure the reliability of the evidence.

Although the trial court determined that the affidavits were not testimonial because they were prepared for general usage against all DUI defendants and were not specifically prepared for use in George's trial, Crawford and Davis do not make such a distinction in determining whether hearsay is testimonial. Instead Crawford and Davis require that a criminal defendant be allowed to confront witnesses against him and direct that hearsay is testimonial and subject to Confrontation Clause protection when the witness is reasonably certain that the statement will be used at trial. Crawford, 541 U.S. at 50-2; Davis, 126 S.Ct. 2266. The affidavits the state seeks to use in this case are testimonial since Trooper Camacho made affirmative statements for the purpose of proving facts against defendants in criminal trials, the affidavits bear a "striking resemblance" to *ex parte* examinations, and the primary purpose for the affidavits is for prosecution. Crawford, 541 U.S. at 52; Davis, 126 S. Ct. at 2278. Moreover, because the affidavits were prepared by law enforcement knowing they would be used to prosecute persons charged with a crime, the reliability of the affidavits is undermined and cross-examination is essential. See e.g. Bertul, 664 P.2d at 1184-85; see also Crawford, 541 U.S. at 50-2 (statements are testimonial and require confrontation if declarant knew they may be used at trial).

As a final matter, Utah Code Ann. § 41-6a-515, which allows the use of testimonial affidavits to prove that an intoxilyzer machine was operating properly,

violates the Sixth Amendment right to confrontation. Although statutes are presumed to be constitutional and the party challenging the constitutionality of a statute "'bear[s] the burden of demonstrating its unconstitutionality'" (Green, 2004 UT 76, ¶42 (further citation omitted)), section 41-6a-515's authorization of the use of testimonial hearsay in the absence of cross-examination violates the Sixth Amendment right to confrontation as outlined in Crawford and Davis; see discussion *supra*.

The trial court erred in concluding that the trooper's affidavits were not testimonial and could be used as evidence against Mr. George at his DUI trial. The trooper prepared the affidavits for use at a criminal trial to help establish guilt. Because the affidavits encapsulated the trooper's testimony without affording Mr. George the opportunity to cross-examine, admission of the affidavits violates the Sixth Amendment. In addition, while Utah Code Ann. §41-6a-515 allows the use of hearsay affidavits to prove at a DUI trial that the intoxilyzer machine was working properly, that statute violates the Sixth Amendment since it permits the use of testimonial hearsay without the opportunity for cross-examination. Moreover, use of a substitute witness who did not conduct the tests would not afford Mr. George his constitutional right to confrontation. Accordingly, the trial court's order should be reversed.

CONCLUSION

Appellant/Defendant Frederick Thomas George, by and through counsel, respectfully requests that this Court reverse the trials court's order and instead, hold that admission of the breath test affidavits would violate the Sixth Amendment right to confrontation.

SUBMITTED this 16 day of January, 2007.

JOAN C. WATT
SAMUEL P. NEWTON
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, salt Lake City, Utah 84114-0230, and two copies to the Salt Lake City Prosecutor, 349 South 200 East #500, Salt Lake City, Utah 84111, this 16 day of January, 2007.

JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Salt Lake City Prosceutor as indicated above on January ____, 2007.

Tab A

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

SALT LAKE CITY,	:	MEMORANDUM DECISION
Plaintiff,	:	Case No. 055900090
v.	:	Judge Robin W. Reese
FREDERICK GEORGE,	:	Date: June 7, 2006
Defendant.	:	

This matter is before the Court on Defendant's Motion in Limine. Having considered the memoranda submitted by the parties,[1] the Court enters the following decision and finds that Defendant's Motion should be **DENIED.**

At issue here are two Certificates of Calibration of Intoxilyzer 5000/8000 prepared by Trooper Byron Camacho. It is undisputed that Trooper Camacho is currently out of the country and is unavailable to testify that he performed the checks on the breath testing instrument at issue here. Therefore, the State would like to admit the Certificates/Affidavits completed by Trooper Camacho in lieu of his testimony, pursuant to Utah Code Ann. § 41-6a-515. Section 41-6a-515 provides:

> (1) The commissioner of the department shall establish standards for the administration and interpretation of chemical analysis of a person's breath or oral fluids, including standards of training.
>
> (2) In any action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or any drug or operating with a blood or breath alcohol content statutorily prohibited, documents offered as memoranda or records of acts, conditions, or events to prove that the analysis was made and the instrument used was accurate, according to standards established in Subsection (1), are admissible if:

[1] The Court would like to note that counsel for both the defense and for the City provided well-written and well-researched memoranda, significantly easing the Court's burden in reaching this decision.

> (a) the judge finds that they were made in the regular course of the investigation at or about the time of the act, condition, or event; and
>
> (b) the source of information from which made and the method and circumstances of their preparation indicate their trustworthiness.
>
> (3) If the judge finds that the standards established under Subsection (1) and the conditions of Subsection (2) have been met, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

Defendant does not argue that the Certificates/Affidavits Trooper Camacho prepared do not comport with the requirements of § 41-6a-515.[2] Rather, Defendant asserts that Section 41-6a-515 and the admission of the Certifications violates the Confrontation Clause because Defendant will not be allowed to examine Trooper Camacho.

At the outset, the Court notes that *Murray City v. Hall*, 663 P.2d 1314 (Utah 1983) appears to resolve this issue. In *Hall*, the court held that:

> given the (1) legitimate governmental interest in not having to produce in every DUI case the public officer responsible for testing the accuracy of the breathalyzer and the ampoules, and (2) the alternative means available to an accused to cross-examine and confront such a witness, we hold that § 41-6-44.3 [the previous version of Section 41-6a-515] does not violate the appellant's constitutional right of confrontation when all of its requirements are met.

Id. at 1322. However, *Hall* raises two problems which limit this Court's ability to rely on the decision. First, *Hall* specifically stated that if an accused wants to question the public officer responsible for testing the breathalyzer, the accused has the right to subpoena the officer. In the present case, Trooper Camacho's unavailability means that Defendant cannot subpoena him. Second, *Hall* was decided prior to the seminal case of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Therefore, the Court must determine whether the affidavits can be admitted even though Defendant cannot call Camacho to

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[2] Although no argument was raised on this point, the Court finds that the Certificates/Affidavits are in compliance with Section 41-6a-515.

testify and whether *Crawford* overruled *Hall*.

In *Crawford*, the U.S. Supreme Court held that "[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." 541 U.S. at 59. This overruled the previous test from *Ohio v. Roberts*, 448 U.S. 56 (1980) which held that hearsay statements were admissible if they bore "adequate indicia of reliability." The court in *Crawford* found that "unpardonable vice" of the "reliability" test was that it admitted "core testimonial statements that the Confrontation Clause plainly meant to exclude." 541 U.S. at 63 (emphasis in original). *Crawford* said that the Sixth Amendment intended to only admit those exceptions that existed at the time of its founding. *Id.* at 54. At that time "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial - for example, business records or statements in furtherance of a conspiracy." *Id.* at 56.

It is undisputed in the present case that, while the declarant (Trooper Camacho) is unavailable, Defendant did not have the opportunity to cross examine him. Therefore, according to *Crawford*, Camacho's affidavits violate the Confrontation Clause if they are "testimonial."

The Court is persuaded that Camacho's affidavits are non-testimonial. *Crawford* specifically leaves "for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. However, a number of jurisdictions have recently addressed this same issue and it appears that the majority of have found that Intoxilyzer certifications are not testimonial for purposes of the Confrontation Clause. *See, e.g., Bohsancurt v. Honorable Eisenberg*, 129 P.3d 471 (Ariz. Ct. App. 2006); *Rackoff v. State*, 621 S.E.2d 841 (Ga. Ct. App. 2005); *Napier v. State*, 827 N.E.2d 565 (Ind. Ct. App. 2005); *State v. Norman*, 125 P.3d 15 (Or. Ct. App. 2005); *Luginbyhl v. Commonwealth*, 618 S.E.2d 347 (Va. Ct. App. 2005).

In particular, Oregon held in *Norman* that *Crawford* and *State v. Mack*, 101 P.3d 349 (Ore. 2004) set the "parameters for determining whether evidence is 'testimonial in nature' under the Sixth Amendment" and those parameters are not satisfied by Intoxilyzer certifications. 125 P.3d at 18. First, the certifications are not intended to be used to convict a particular defendant of a crime but are evidence of the accuracy of a test result arrived at by a machine. Evidence of the accuracy of a test result does not implicate the methodology of police or prosecutorial examinations of potential witnesses, as the Confrontation Clause is concerned about *Id.* Second, the technicians

were not acting as proxy for the police in their investigative functions, they were merely ensuring that the machines operated properly and provided accurate results. "Unlike police or prosecutorial interrogators, the technicians have not demonstrable interest in whether the certifications produce evidence that is favorable or adverse to a particular defendant." *Id.* at 18-19. Finally, exceptions for admission of Intoxilyzer certifications parallel the historical hearsay exceptions that were deemed non-testimonial, particularly the business records exception. *Id.* at 19.

The Court is persuaded by *Norman*, et. al. that *Crawford* would not change the result in *Hall* because § 41-6a-515 only admits Certifications which are non-testimonial because they were not prepared to be used against a particular defendant, they are not based on subjective factors such as police interrogation methods, and Section 41-6a-515 is derived from the historical business records hearsay exception.[3] Additionally, the Court finds that this holding resolves the other problem with *Hall*, that it indicated that the State had not violated the Confrontation Clause because the defendant could call the technician to testify. Because the Certifications are non-testimonial, Defendant's Sixth Amendment rights are not violated even though he cannot call Trooper Camacho to testify.

Defendant relies on a number a number of cases from other jurisdictions which found "breath test affidavits" inadmissible. However, Defendant's reliance is misplaced. Specifically, Defendant relies on *People v. Rogers*, 780 N.Y.S.2d 393, 8 A.D.3d 888 (2004) and *Shiver v. State*, 900 So.2d 615 (Fla. Ct. App. 2005). The Court is persuaded by *Bohsancurt's* specific distinction of those cases. *Bohsancurt* held that *Rogers* was distinguishable because "it held that . . . laboratory reports are testimonial, [but such] reports [are] inculpatory in a way that calibration and maintenance records are not. . . . In contrast to the types of reports involved in [*Rogers*], the recorded results of calibration testing in the abstract do not relate to any specific defendant or particular case." 129 P.3d at 478. *Bohsancurt* also distinguished *Shiver* by saying,

> [a]lthough at first blush it appears *Shiver* dealt with records similar to Arizona's QARs. The Florida records actually included breath-test results of the individual defendant in

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[3] The City argues that, if Section 41-6a-515 is invalidated, the Certifications/Affidavits are also admissible under the business records exception. The Court does not reach this issue because it finds that Section 41-6a-515 is constitutional.

> addition to a section in which the officer who conducted the breath-test had certified that *another* officer had calibrated and checked the machine. Those facts are clearly distinguishable from those presented here.

Id. at 478 n.6. The Court finds that the other cases cited by Defendant are clearly distinguishable for the same reasons offered to distinguish *Rogers*.

Defendant also relies heavily on *State v. Workman*, 2005 UT 66, 122 P.3d 639. In *Workman*, Christine Wright of the Utah State Crime Laboratory personally took samples of substances, etc. from a home where officers had served a search warrant. Wright then analyzed the samples and positively identified meth and meth precursors. *Id.* at ¶ 2. On the day of trial, Wright was unavailable and the State sought to have Wright's supervisor, Jennifer McNair, testify as a substitute witness. *Id.* at ¶ 5. The Utah Supreme Court found it was error to allow McNair to testify in place of Wright for three reasons. First, the nature of the testing was subjective (the tests depended "upon subjective inferences by the testing party, based, as McNair testified, on their 'training and experience.' *id.* at ¶ 15). *Id.* at ¶¶ 13-15. Second, given the nature of the tests, it would have been every difficult for the defendants to challenge the evidence without cross-examining those personally involved in the testing. *Id.* at ¶ 17. Specifically, because of the subjective element of the testing, the defendants should have been allowed to ask questions about whether the testing was conducted properly. *Id.* at ¶¶ 17-18. Additionally, Defendant was not able to prepare for Wright's absence because it was only announced on the day of the trial. *Id.* at ¶ 18. Finally, the testing involved in this case was materially different from testing in other cases where the court allowed substitute witnesses in that the testing was not based on "promulgated, rigid guidelines and standards." *Id.* at ¶¶ 19-20.

It is clear to the Court that *Workman* is distinct from this case for a number of reasons. First, unlike Wright who collected evidence and tested it with regard to a specific case, Trooper Camacho did not perform the inspection in order to test a specific defendant or to aid in a specific prosecution. Second, there is no evidence that the testing done by Trooper Camacho involved any subjective elements. Instead, it appears that the testing is based on "promulgated, rigid guidelines and standards," making it more like cases where expert witnesses were allowed to substitute for one another. Third, because there was no subjective element to Trooper Camacho's testing, this is not the type of evidence that Defendant needs to be allowed to cross examine upon. Fourth, there is no special prejudice to Defendant

because Trooper Camacho's absence was announced well in advance of trial. Finally, the City does not seek to "substitute" one expert for another, as in *Workman* (and *Shiver*). Instead, Camacho will still be "testifying," he will simply be testifying via affidavit.

For the foregoing reasons, the Court finds that Defendant's Motion in Limine should be DENIED and the City should be allowed to present Trooper Camacho's Certifications/Affidavits.

SO ORDERED this 7 day of June, 2006.

Judge Robin W. Reese
District Court Judge

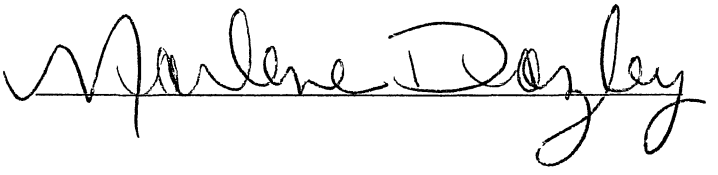
THIRD DISTRICT COURT SALT LAKE CITY STATE OF UTAH

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, on this 7 day of June, 2006.

Simarjit S. Gill
Salt Lake City Prosecutor's Office
Bernadette M. Gomez
Associate City Prosecutor
349 South 200 East, Suite 500
Salt Lake City, Utah 84111

Samuel P. Newton
Salt Lake Legal Defender Association
Attorney for Defendant
424 East 500 South, Suite 300
Salt Lake City, Utah 84111



Tab B

IN THE UTAH COURT OF APPEALS

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Frederick George,	)	ORDER
	)	
Petitioner,	)	
	)	Case No. 20060591-CA
v.	)	
	)	
Salt Lake City,	)	
	)	
Respondent.	)	

Before Judges Davis, Greenwood, and Orme.

This case is before the court on petitioner Frederick George's petition for permission to appeal from an interlocutory order.

IT IS HEREBY ORDERED that the petition for permission to appeal is granted. The parties will be notified when a briefing schedule is established.

DATED this 7th day of July, 2006.

FOR THE COURT:

Pamela T. Greenwood,
Associate Presiding Judge

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2006, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

SIMARJIT SINGH GILL
BERNADETTE GOMEZ
SALT LAKE CITY ATTORNEY OFFICE
349 S 200 E STE 500
SALT LAKE CITY UT 84111

SAMUEL P NEWTON
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 E 500 S STE 300
SALT LAKE CITY UT 84111

THIRD DISTRICT, SALT LAKE
ATTN: SOPHIE ORVIN / JODI BAILEY
450 S STATE ST
PO BOX 1860
SALT LAKE CITY UT 84114-1860

Dated this July 7, 2006.

By _____
Deputy Clerk

Case No. 20060591
THIRD DISTRICT, SALT LAKE, 055900090

Tab C

UTAH CODE ANN. § 41-6a-515 (2005)

41-6a-515. Standards for chemical breath or oral fluids analysis — Evidence.

(1) The commissioner of the department shall establish standards for the administration and interpretation of chemical analysis of a person's breath or oral fluids, including standards of training.

(2) In any action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or any drug or operating with a blood or breath alcohol content statutorily prohibited, documents offered as memoranda or records of acts, conditions, or events to prove that the analysis was made and the instrument used was accurate, according to standards established in Subsection (1), are admissible if:

(a) the judge finds that they were made in the regular course of the investigation at or about the time of the act, condition, or event; and

(b) the source of information from which made and the method and circumstances of their preparation indicate their trustworthiness.

(3) If the judge finds that the standards established under Subsection (1) and the conditions of Subsection (2) have been met, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

UTAH CODE ANN. § 41-6-44.3

41-6-44.3. Standards for chemical breath analysis — Evidence.

(1) The commissioner of the Department of Public Safety shall establish standards for the administration and interpretation of chemical analysis of a person's breath, including standards of training.

(2) In any action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or any drug or operating with a blood or breath alcohol content statutorily prohibited, documents offered as memoranda or records of acts, conditions, or events to prove that the analysis was made and the instrument used was accurate, according to standards established in Subsection (1), are admissible if:

(a) the judge finds that they were made in the regular course of the investigation at or about the time of the act, condition, or event; and

(b) the source of information from which made and the method and circumstances of their preparation indicate their trustworthiness.

(3) If the judge finds that the standards established under Subsection (1) and the conditions of Subsection (2) have been met, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Tab D

State of Utah

JON M HUNTSMAN, JR
Governor

GARY R HERBERT
Lieutenant Governor

Department of Public Safety
ROBERT L FLOWERS
Commissioner

CUSTODIAN CERTIFICATE

I, the undersigned, being first duly sworn, state that:

1. I am the Breathtesting Supervisor of the Utah Highway Patrol and the official keeper of and responsible for the maintenance check records of the breathtesting instruments maintained in the State of Utah.

2. Attached are true and correct copies of the records of maintenance and certification for the Intoxilyzer serial number 68-002336 located at SLCPD Pioneer, of which are kept on file by me, in the course of official business, for the State of Utah, Department of Public Safety and in accordance with the current regulations of the Commissioner of Public Safety.

3. The attached tests were done **BEFORE** and **AFTER** the date of March 31, 2005.

4. The breathtest technician(s) whose signature(s) appear on the attached affidavit(s) are certified by the State of Utah and has/have met all of the following requirements as required by the Department of Public Safety:
   a. Satisfactory completion of operator's initial certification course and/or renewal course;
   b. Satisfactory completion of the Breath Alcohol Testing Supervisor's course offered by the Indiana University, or an equivalent course of instruction, as approved by the Breath Alcohol Testing Program;
   c. Satisfactory completion of a Breath Alcohol Testing Instrument Manufacturer's Maintenance/Repair Technician course for the instruments in use in the State of Utah or is qualified by nature of his/her employment or training to maintain/repair those instruments;
   d. Maintain Technician's status through a minimum of eight (8) hours related training each calendar year.

5. I am competent to testify and have personal knowledge of the matter alleged in this affidavit.

NOTARY PUBLIC
PAUL KOTTER
5681 South 320 West
Murray, Utah 84107
My Commission Expires
April 21, 2007
STATE OF UTAH

Steven Winward

Sergeant Steven Winward
Breathtesting Supervisor
Utah Highway Patrol

STATE OF UTAH
COUNTY OF SL
ON THE 21st DAY OF July, 2005, PERSONALLY APPEARED BEFORE ME, STEVEN WINWARD WHO BEING DULY SWORN BEFORE ME EXECUTED THE ABOVE REFERENCED CERTIFICATE AND I CERTIFY THAT SAID PERSON IS AN OFFICER AND EMPLOYEE OF THE DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF UTAH AND IS THE LEGAL CUSTODIAN OF THE INTOXILYZER AFFIDAVITS OF SAID DEPARTMENT AND THAT HIS SIGNATURE AFFIXED HERETO IS GENUINE.

NOTARY PUBLIC

PLAINTIFF'S EXHIBIT 1

Development and Technology Center, 5681 South 320 West, Salt Lake City, UT 84107
(801) 284-5500 • facsimile (801) 284-5556

Utah!

Utah Department of Public Safety
Certificate of Calibration
Intoxilyzer 5000 / 8000

I. We the undersigned, being first duly sworn state that:

1. Breath testing instrument INTOXILYZER, serial number 68002336 located at S.L.C PD - Pioneer was properly checked by me/us in the course of official duties, on March 21, 2005 @ 1002 Last prior check of this instrument was done on Feb 22, 2005
2. This was done by a currently certified technician and according to the standards established by the Commissioner of the Utah Department of Public Safety.
3. This is the official record and notes of this procedure which were made at the time these tests were done.
4. I am/We are competent to testify and have personal knowledge of the matters alleged in this certificate.

THE FOLLOWING TESTS WERE MADE:

Yes	No		
☑	☐	1.	**Electrical Power Check:** (Red power switch on. Displays "Not Ready")
☑	☐	2.	**Temperature Check:** (Displays "Push button to start test", etc)
☑	☐	3.	**Internal Purge Check:** (Air pump works, runs for approximately 12 to 15 seconds.)
☑	☐	4.	**Internal Calibration Check:** (Internal standards within factory specifications)
☑	☐	5.	**Invalid Test:** (Push the green start test button while the instrument is in test mode.)
☑	☐	6.	**Diagnostic Check:** (Prom check, Ram check, Temperature check, Processor check, Printer check)
☑	☐	7.	**Checked with Known Sample:** (Simulator, 3 tests within + or - .005 or 5% whichever is greatest)
☑	☐	8.	**Gives Readings in:** (Grams of Alcohol / 210 Liters of Breath)
☑	☐	9.	**The Simulator Solution:** (Was of the correct kind and properly compounded)
☑	☐	10.	**The Results of This Test Show:** (That the instrument is working properly)

REPAIRS REQUIRED: (Explain) No Repairs

NOTARY PUBLIC
STEVEN WINWARD
5681 South 320 West
Murray, Utah 84107
My Commission Expires
May 5, 2007
STATE OF UTAH

(NOTARY SEAL)

CERTIFIED BREATH TEST TECHNICIANS

Brad Camacho

I/We, on oath, state the foregoing is true.

Subscribed and sworn before me this 22 (Day) day of March (Month), 2005 (Year)

Steven Winward

PLAINTIFF'S EXHIBIT 2

BrACForm rev 10/04

Utah Department of Public Safety
Certificate of Calibration
Intoxilyzer 5000 / 8000

I We the undersigned, being first duly sworn. state that.

1 Breath testing instrument INTOXILYZER, serial number 68002336 located at S.L.C.P.D - Pioneer. was properly checked by me/us in the course of official duties. on April 15, 2005 @ 1157 Last prior check of this instrument was done on March 21, 2005

2. This was done by a currently certified technician and according to the standards established by the Commissioner of the Utah Department of Public Safety.

3 This is the official record and notes of this procedure which were made at the time these tests were done.

4. I am/We are competent to testify and have personal knowledge of the matters alleged in this certificate.

THE FOLLOWING TESTS WERE MADE:

Yes	No		
☑	☐	1.	**Electrical Power Check:** (Red power switch on Displays "Not Ready")
☑	☐	2.	**Temperature Check:** (Displays "Push button to start test", etc)
☑	☐	3.	**Internal Purge Check:** (Air pump works, runs for approximately 12 to 15 seconds.)
☑	☐	4.	**Internal Calibration Check:** (Internal standards within factory specifications)
☑	☐	5.	**Invalid Test:** (Push the green start test button while the instrument is in test mode)
☑	☐	6.	**Diagnostic Check:** (Prom check, Ram check, Temperature check, Processor check. Printer check)
☑	☐	7.	**Checked with Known Sample:** (Simulator, 3 tests within + or - 005 or 5% whichever is greatest)
☑	☐	8.	**Gives Readings in:** (Grams of Alcohol / 210 Liters of Breath)
☑	☐	9.	**The Simulator Solution:** (Was of the correct kind and properly compounded)
☑	☐	10	**The Results of This Test Show:** (That the instrument is working properly)

REPAIRS REQUIRED: (Explain) No Repairs.

NOTARY PUBLIC
PAUL KOTTER
5681 South 320 West
Murray Utah 84107
My Commission Expires
April 21 2007
STATE OF UTAH

(NOTARY SEAL)

CERTIFIED BREATH TEST TECHNICIANS

BRIAN CARACHO

I/We, on oath. state the foregoing is true.

Subscribed and sworn before me this 19 (Day) day of April (Month), 2005 (Year)

PLAINTIFF'S EXHIBIT 3

BrAC Form rev 10/04